Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-381-94
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN FCJ AND SHAIK DAUD JCA
22 SEPTEMBER 1995

Civil Procedure *— Res judicata — Cause of action estoppel — Two similar causes of action between similar parties in two different proceedings — Final judgment given in first proceeding — Whether prevented by cause of action estoppel*

A fixed loan of RM750,000 ('the loan') was granted by the appellant ('the finance company') to the respondent ('the borrower') for the purpose of financing a housing project. As security, several pieces of land were charged by the borrower to the finance company. The terms and conditions of the loan were contained in a letter of offer ('the letter of offer') dated 14 November 1985 ('the date of offer') which provided, inter alia, that the first drawdown must be made within three months from the date of offer and that the loan would be available for 15 months from the date of offer, ie until 14 February 1987, during which time, the borrower must draw upon the loan completely or the undrawn balance would be cancelled. The time for the first drawdown was subsequently extended by the finance company to 31 March 1986. The borrower, however, failed to utilize the loan completely by 14 February 1987, and on 4 May 1987, the finance company informed the borrower that it could no longer draw down on the unused balance of RM400,000. The borrower went into financial difficulty and could not carry out the housing project. The borrower later defaulted, and the finance company successfully obtained an order of sale from the land administrator. On 22 January 1988, the borrower filed an originating motion in the High Court against the finance company, praying for, inter alia, an order to set aside the order for sale and damages in connection with the failure of the housing project due to the denial of the right to use the balance of the loan ('the first proceeding'). The borrower argued that when the date for the first drawdown was extended, the availability period as stipulated in the letter of offer had also been waived accordingly. The High Court dismissed the borrower's application and its appeal to the Supreme Court was also dismissed. The borrower then brought an action against the finance company in the High Court for damages on the same ground as the first proceeding. The finance company's application to strike out the borrower's statement of claim on a plea of res judicata was dismissed. The finance company has appealed.

Held, allowing the appeal:

(1) When a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata, as the judgment becomes the truth between such parties. An estoppel *per rem judicatum* has been created as a result.

(2) There are two kinds of estoppel per rem judicatum, ie cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

(3) Unlike an ordinary estoppel which should be pleaded, the court has the inherent jurisdiction to dismiss an action by applying the doctrine of res judicata, which is an estoppel based on public policy, even if it has not been pleaded, as public policy requires that there should be finality in litigation.

(4) The borrower's case was a classical case for the application of the doctrine of res judicata by way of a cause of action estoppel. The causes of action of both the first proceeding and the present statement of claim were identical, as both claimed damages for failure of the finance company to allow the borrower to utilize in full the loan of RM750,000, causing loss consequent upon the failure of the housing development to be proceeded with further. All rights and liabilities of both parties had merged into the judgment of the first proceeding and the effect of a cause of action estoppel was absolute.

[Bahasa Malaysia summary

Suatu pinjaman tetap sejumlah RM750,000 ('pinjaman itu') telah diberikan oleh perayu ('syarikat kewangan') kepada penentang ('peminjam') untuk tujuan pembiayaan suatu projek perumahan. Sebagai cagaran, beberapa bidang tanah telah dicagarkan oleh peminjam kepada syarikat kewangan itu. Terma dan syarat pinjaman itu adalah terkandung di dalam sepucuk surat tawaran ('surat tawaran itu') bertarikh 14 November 1985 ('tarikh tawaran itu') yang memperuntukkan, antara lain, bahawa pengeluaran pertama harus dibuat dalam tempoh masa tiga bulan dari tarikh tawaran dan bahawa pinjaman itu boleh didapatkan dalam masa 15 bulan dari tarikh tawaran, iaitu sehingga 14 Februari 1987, di mana peminjam harus mengeluarkan kesemua pinjaman tersebut, jika tidak, baki yang belum dikeluarkan akan dibatalkan. Masa untuk pengeluaran pertama kemudiannya dilanjutkan oleh syarikat kewangan ke 31 Mac 1986. Walau bagaimanapun, peminjam gagal untuk menggunakan kesemua

pinjaman pada 14 Februari 1987, dan pada 4 Mei 1987, syarikat kewangan telah memaklumkan kepada peminjam bahawa ia tidak boleh lagi mengeluarkan baki yang belum digunakan sejumlah RM400,000. Peminjam mengalami kesulitan kewangan dan tidak dapat menjalankan projek perumahan tersebut. Peminjam kemudiannya ingkar, dan syarikat kewangan tersebut berjaya mendapatkan suatu perintah jualan daripada pentadbir tanah. Pada 22 Januari 1988, peminjam memfailkan suatu saman pemula di Mahkamah Tinggi terhadap syarikat kewangan, yang memohon untuk, antara lain, suatu perintah untuk mengenepikan perintah jualan dan ganti rugi yang berkaitan dengan kegagalan projek perumahan itu akibat penafian hak mereka untuk menggunakan baki pinjaman itu ('prosiding pertama'). Peminjam itu berhujah bahawa apabila tarikh untuk pengeluaran pertama dilanjutkan, tempoh terdapatnya pinjaman seperti yang telah dinyatakan di dalam surat tawaran itu juga telah diketepikan. Mahkamah Tinggi menolak permohonan peminjam dan rayuannya kepada Mahkamah Agung juga telah ditolak. Peminjam kemudiannya telah membawa suatu tindakan terhadap syarikat kewangan itu di Mahkamah Tinggi untuk ganti rugi atas alasan yang sama seperti prosiding pertama. Permohonan syarikat kewangan itu untuk membatalkan penyataan tuntutan peminjam atas alasan res judicata telah ditolak. Syarikat kewangan membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Apabila sesuatu perkara di antara dua pihak telahpun dihakimi dan diputuskan oleh sesuatu mahkamah yang mempunyai bidang kuasa yang kompeten, mereka dan privi mereka adalah tidak dibenarkan untuk membuat litigasi sekali lagi res judicata itu, kerana penghakiman itu menjadi kebenaran di antara pihak tersebut. Sebagai hasilnya, suatu 'estoppel per rem judicatum' telah dibentuk.

(2) Terdapat dua jenis 'estoppel per rem judicatum' iaitu estopel kausa tindakan dan estopel isu. Estopel kausa tindakan menghalang penegasan semula suatu kausa tindakan yang telahpun diputuskan dalam suatu penghakiman muktamad di antara pihak yang sama. Sebaliknya, estopel isu menghalang penyangkalan kebetulan suatu penghakiman muktamad oleh pihak yang sama di dalam suatu prosiding yang berikut. Selanjutnya, pihak-pihak yang berkenaan juga dihalang daripada membangkitkan sesuatu kausa tindakan atau isu yang seharusnya dibangkitkan tetapi tidak dibangkitkan di dalam prosiding yang terdahulu, sama ada dengan sengaja atau tidak sengaja.

(3) Tidak seperti estopel biasa yang harus dinyatakan di dalam pliding, mahkamah mempunyai bidang kuasa sedia ada untuk menolak suatu tindakan dengan menggunakan doktrin res judicata, yang merupakan suatu estopel berdasarkan polisi awam, walaupun ia tidak dinyatakan dalam pliding, oleh kerana polisi awam mengkehendaki supaya terdapat kemuktamadan di dalam litigasi.

(4) Kes peminjam adalah suatu kes klasik untuk penggunaan doktrin res judicata secara estopel kausa tindakan. Kausa tindakan kedua-dua usul pemula dan penyataan tuntutan ini adalah serupa, kerana kedua-duanya menuntut ganti rugi untuk kegagalan syarikat kewangan untuk membenarkan peminjam menggunakan dengan sepenuhnya pinjaman RM750,000 itu, yang mengakibatkan kerugian akibat projek perumahan itu tidak dapat dilaksanakan selanjutnya. Kesemua hak dan tanggungan kedua-dua pihak telah bercantum dengan penghakiman prosiding pertama dan kesan suatu estopel kausa tindakan adalah mutlak.]

Notes

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2892–2939.

Cases referred to

Bell v Holmes [1956] 3 All ER 449; [1956] 1 WLR 1359 (folld)
Chamberlain v Deputy Commissioner of Taxation (1988) 62 ALJR 324 (folld)
Conquer v Boot [1928] 2 KB 336 (folld)
Greenhalgh v Mallard [1947] 2 All ER 255 (folld)
Henderson v Henderson (1843) 3 Hare 100 (folld)
Hoystead v Taxation Commissioner [1962] AC 155 (folld))
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (distd)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] MLJ 49 (refd)
LE Walwin & Partners Ltd v West Sussex County Council [1975] 3 All ER 604 (folld)
Lawlor v Gray [1984] 3 All ER 345 (folld)
Public Trustee v Kenward [1967] 2 All ER 870; [1967] 1 WLR 1062 (folld)
SCF Finance Co Ltd v Masri & Anor (No 3) [1987] QB 1028; [1987] 1 All ER 194 (folld)
Superintendent of Pudu Prison v Sim Kie Chong [1986] 1 MLJ 494 (folld)
Yat Tung Investment Co v Dae Heng Bank & Anor [1975] AC 581; [1975] 2 WLR 690 (folld)

Legislation referred to

Evidence Act 1950 s 40
National Land Code 1965 Form 16D
Rules of the High Court 1980 O 18 r 19

Teo Cheng Wee (*Wan Marzimin* with him) (*Khaw & Hussein*) for the appellant.
Kumar Kathigesu (*Mahalingam & Co*) for the respondent.

Cur Adv Vult

Peh Swee Chin FCJ (delivering the judgment of the court): This appeal once again raises the question of the plea of res judicata which has arisen quite frequently, eg for the sitting of the Federal Court for the week commencing on 17 July 1995, three separate appeals, inclusive of the instant appeal, were listed for hearing, all involving and depending on the decision of such a plea. The frequency with which this plea has surfaced could have been caused by certain controversial aspects in the law relating to it, so that it behoves us to state our point of view on those aspects.

In the instant appeal, the High Court below had earlier dismissed an application under O 18 r 19 from the defendant (hereinafter called 'the finance company') to strike out the plaintiff's statement of claim on grounds, inter alia, of a plea of res judicata, ie in turn, it being an abuse of process of the court (the plaintiff is hereinafter called 'the borrower'). The learned judge dismissed the application, holding, inter alia, and in effect that the plea of res judicata was not successful stating that there was 'no question of the plaintiff's statement of claim being frivolous or vexatious or an abuse of the process of the court'; hence this appeal. His Lordship felt bound also by the decision of *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, a decision of the Supreme Court.

The borrower's statement of claim claims special damages for loss of profit in the sum of RM1,015,700 and general damages in connection with a housing development or proposed housing development which could not get off the ground on account of the finance company allegedly refusing to disburse completely an agreed loan of RM750,000. The said statement of claim, in so far as it relates to the defendant's plea of res judicata, appears to be based primarily on a letter of offer dated 14 November 1985 to grant the said loan to the borrower from the finance company, the material provisions of which are set out below:

Asia Commercial Finance (M) Bhd

14 November 1985

Kawal Teliti Sdn Bhd
33A, Jalan Goh Hock Huat
Kelang
41400 Selangor

Attn: Mr Tan Seng

Dear Sirs

Fixed loan of RM750,000 and end-finance facility of RM1.5m

We are pleased to inform you that our company has approved for your use a fixed loan of RM750,000 and end-finance facility of RM1.5m, based substantially on the following terms and conditions:

I Fixed loan

1 *Amount of loan*

RM750,000 (Ringgit: Seven hundred and fifty thousand only)

2 *Interest rate*

4%pa above the base lending rate (BLR) of Asia Commercial Finance (M) Bhd and calculated on basis of monthly rests. Our current BLR is 12%pa.

3 *Period of loan*

Not exceeding eighteen (18) months from date of first drawdown.

Security

(a) First legal charge over thirty-two (32) individual lots held under title Nos HS(M) 2690–2696, 2699–2709 and 2724–2737 for Lot Nos 832–838, 841–851 and 866–879, respectively, Section one, Mukim of Tanjong Duabelas, Tempat of Banting, Selangor.

...

...

6 *Repayment*

(a) Servicing of monthly interest in arrears.

...

7 *Availability period*

The first drawdown must be effected within three (3) months from date of offer, failing which the loan shall be treated as lapsed and cancelled. The loan shall be available for fifteen (15) months from date of offer. Thereafter, any undrawn portion of the loan shall be treated as lapsed and cancelled. [Clauses 8–15, Pts II, III, IV and V are omitted.]

If the above stated terms and conditions are acceptable to you, kindly confirm acceptance on the duplicate copy of this letter and return to us within fourteen (14) days from date hereof, failing which the offer shall be treated as lapsed and cancelled.

Yours faithfully	I/We confirm acceptance
Asia Commercial Finance (M) Bhd	of the above facility
—Sgd—	—Sgd—
Andrew Goh Hock Chuan	Kawal Teliti Sdn Bhd
General Manager	Managing Director

In pursuance of other provisions of the said letter of offer, the charge of certain lands of the borrower was executed by the borrower in favour of the finance company.

Subsequently, for failure to pay interest pursuant to cl 6(a) of the said letter of offer, commitment and legal fees, the finance company served a Form 16D under the National Land Code 1965, being the preliminary step prior to applying for an order of sale from the relevant land administrator. The finance company subsequently applied for and obtained a statutory order of sale of the charged lands on 12 November 1987.

Then on 22 January 1988, the borrower (as plaintiff), filed an originating motion being Kuala Lumpur High Court Originating Motion No S7–32–9–1988 against the finance company (as defendant), as follows:

A Notice of motion

Take notice that on Wednesday 10 February 1988 at 10 o'clock in the forenoon or as soon thereafter as he can be heard, counsel for the abovenamed plaintiff will move the court for an order that:

(i) the order for sale made on 12 November 1987 under s 253 of the B National Land Code 1965 against the plaintiff in respect of the above properties be set aside;

(ii) a declaration that on the true construction of the said agreement and in the events which have happened the said loan is for a period of 18 months and the time commences to run from the first drawdown;

C (iii) the defendant do pay the plaintiff damages to be assessed;

(iv) such further or other or consequential directions or orders be given or made as the honourable court deems fit or proper; and

(v) the costs of and incidental to this application be borne by the defendant in any event.

D The grounds of the application appear and are shown in the affidavit annexed and filed herein.

Dated 22 January 1988.

—Sgd—	—Sgd—
Solicitors for the plaintiff abovenamed	Senior assistant registrar High Court, Kuala Lumpur

E

From the supporting affidavit of the originating motion, prayer (iii) therein is to be borne in mind as it is similar to the claim for damages in the statement of claim of the present action concerned herein.

The gist of the borrower's supporting affidavit for the said originating F motion was first, that the said loan of RM750,000 mentioned in the said letter of offer, was available for a period of 15 months from the date of offer, ie from 14 November 1985 until 14 February 1987, during which time, the borrower must draw upon the said loan completely, if not, the undrawn balance would be treated as 'lapsed and cancelled' and secondly, the first drawdown of the said loan must be made within three months G from the date of offer, ie by 14 February 1986. All this was indeed in accordance with cl or para 7 of the said letter of offer set out above, and it was common ground for the said cl 7 to be so interpreted just as stated.

Because of the undisputed and subsequent request made to the finance company by the borrower, the finance company agreed to allow H such first draw-out to be done by 31 March 1986 instead of the original date of 14 February 1986 aforesaid. Thus, the time for the first drawdown was extended by consent up to 31 March 1986.

In amplication of what has just been stated above, it was common ground that both parties meant that going merely by cl 7 of the letter of I offer, the loan of RM750,000 should be completely utilized and drawn out within 15 months from date of offer, ie by 14 February 1987.

Then, even by 4 May 1987, the said loan had still not been drawndown or utilized by the borrower completely, and on the same date, the finance company informed the borrower that the borrower could no longer drawdown on the unused balance of the said loan as the last day for drawdown, or rather draw-out was on 14 February 1987.

In reply, the borrower wrote to the effect that by allowing the extension of time to make the first drawdown aforesaid, the finance company had 'also waived the whole of the said para 7 in so far as the same' provided that the said fixed loan should be available to and drawn out (completely) by the borrower for 15 months from date of offer, ie by 14 February 1987' and the borrower, to quote further, 'and/or alternatively is estopped from reliance on para 7 of the letter of offer'.

Due to the refusal of the finance company in allowing the draw-out of the balance of the said loan, (the balance being RM400,000), the borrower alleged it could not carry on the housing scheme or housing development.

The learned judge in the said originating motion dismissed it with costs with a two-page judgment in finding no merits. The said judgment is set out below:

> This was an application by the plaintiffs to have an auction of their properties ordered by the land office set aside.
>
> Mr Krishna Aiyar submitted that there were four points to be considered — the period of the fixed loan, in what way the interest was to be paid, whether the calculation of interest was right and fourthly, the validity of Form 16D.
>
> Counsel for both parties made lengthy submissions but I do not propose to go into them in great detail. Suffice it to say that I came to the conclusion that there were no merits whatsoever in the plaintiffs' application. The period of the loan and the calculation of interest are sufficiently documented in the charge documents and exhibits in the affidavits. As for the Form 16D, the main contention raised by the plaintiffs was that in their letter of demand the defendants had entered the sum of commitment fees and therefore Form 16D should be held invalid. I am afraid I did not agree with this submission. The letter of demand which included this fee did not render the subsequent Form 16D invalid.
>
> In the circumstances therefore I dismissed the plaintiffs' application with costs.
>
> Dated this 7 June 1988.
>
> —Sgd—
> (Dato' Ajaib Singh)
> Judge
> High Court Malaya
> Kuala Lumpur

Going by para 1 of the short judgment above, it appears that the learned judge had only singled out and dealt only with prayer 1 of the originating motion. We think it could be safely assumed that he had singled out prayer 1 for emphasis, and he had adjudicated on all the other prayers, as

A he was bound to and he in fact discussed very briefly the period of the fixed loan — the subject of prayer 2 and the basis for potentially making an order in terms of prayer 3.

The borrower appealed to the Supreme Court in Supreme Court Civil Appeal No 235–88, and such appeal was dismissed with costs after B hearing both parties.

The finance company had opposed all the contentions of the borrower in the said originating motion.

In the instant appeal before us, the statement of claim filed in the court below asks for damages for loss of profit and other damages in C connection with the failure of the housing scheme or development due to the denial of the right to use the balance of the said loan of RM750,000.

The statement of claim gives the same reasons of the extended time for the first drawdown. The statement of claim says further to the effect that the said loan was subject to 'two conditions precedent', ie the condition about the time for the first drawdown and the condition about the time of D availability of the said loan of RM750,000 and both conditions were 'waived' by the finance company on 22 March 1986, ie the date when the first drawdown was made in the same extended time, or the finance company was estopped from not lending the balance of the said loan, etc.

Despite the employment of different wording by the present solicitors E in the action concerned herein from the previous solicitors of the borrower in the said originating motion, the claim for damages in the present statement of claim and the claim for damages in the previous originating motion are in substance identical, resting on the same facts or issues.

The finance company in an affidavit supporting an application filed F in the court below, under O 18 r 19 to strike out the statement of claim, has pleaded res judicata, and referred to the particulars of the earlier affidavit of the borrower in respect of the earlier originating motion.

The learned judge in the court below however, in effect dismissed the plea of res judicata, and consequently also the finance company's application G under O 18 r 19 of the Rules of the High Court 1980 as described earlier, hence the appeal before us. To determine if the action concerned herein below is doomed to failure (for if so, the application under O 18 r 19 would have been wrongly dismissed) one has to deal with the certain controversial aspects of the plea of res judicata referred to in the beginning.

H What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it I as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro*

eadem causa. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy. A

Since a res judicata creates an estoppel *per rem judicatum*, the doctrine of res judicata is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. B Since the two doctrines are the same, it is no longer of any practical importance to say the res judicata is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

The starting point ought to be the celebrated passage by Wigram VC C in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time. D

It may be of interest to point out that one of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties, a default judgment is different from a final judgment on the merits, the latter is the category to which the judgment in the said originating motion given before the filing of the action as concerned directly herein E below belongs. Please see the finer points of law in regard to default judgments from the position of the doctrine of res judicata in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49. We have thus mentioned this question of default judgment in passing as it has sometimes been a small source of confusion to the litigants. F

To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg please see s 40 of the Evidence Act 1950, it will G be readily understood that when Wigram VC spoke of 'points', the points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties. The relevant case law revolves itself into this understanding. Lack of this understanding causes, in our view, a fair share H of the confusion in connection with the famous passage of Wigram VC which Lord Shaw in *Hoystead v Taxation Commissioner* [1962] AC 155 at p 170 spoke of as 'settled law' in the Privy Council.

Thus, there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue I estoppel, which is a development from the first type.

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy

A are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.

B In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to C inadvertence. A few cases below will illustrate the point.

In *Public Trustee v Kenward* [1967] 2 All ER 870; [1967] 1 WLR 1062, in which an account of administration proceedings was taken of the defendant's indebtedness to his deceased wife's estate. He made various counterclaims of sums due to him but omitted to raise the question that D certain land forming part of his wife's estate was a partnership asset belonging to both his deceased wife and himself. When the plaintiff, the Public Trustee, subsequently claimed payment of sums due from the defendant, the defendant was estopped from raising the question of the said partnership land.

E In *Conquer v Boot* [1928] 2 KB 336, the plaintiff obtained judgment after a contest in respect of a breach of warranty to build a house in a good and workmanlike manner. Subsequent to the judgment, the plaintiff suffered further loss or further loss emerged by virtue of the same breach of warranty. Such further loss might not have been apparent at the time of first action. It was held that the cause of action was res judicata and he was F estopped from asserting for the second time the same breach of warranty. It is interesting to note that in the second action, the same breach was described differently but this did not prevent the estoppel from operating.

In *Chamberlain v Deputy Commissioner of Taxation* (1988) 62 ALJR 324, the High Court of Australia applied the doctrine of res judicata to G prevent recovery of the balance of understated tax as a result of previously omitting a last digit of zero.

Again in *LE Walwin & Partners Ltd v West Sussex County Council* [1975] 3 All ER 604, it was held that plaintiff's claim in 1975 to a right to maintain a barrier on a certain road on the ground only of an earlier partial H dedication of it, was faced with a judgment in 1958, in which the predecessor in title of the plaintiff had been a party to proceedings before the Quarter Sessions over the status of the same road, and in which the said predecessor in title failed to raise the question of the right to maintain such a barrier. It was held that the failure of the said predecessor in title, ie a privy to the present plaintiff, to raise the question estopped the plaintiff from raising I the said question and the action failed.

On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means

in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawlor v Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.'

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and *not* to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel *per rem judicatum*.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

It is further necessary at this stage to understand the import of the words in the said famous statement, ie '... every point which properly belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

This explanation of Somervell LJ was also quoted with approval in the Privy Council in *Yat Tung Investment Co v Dae Heng Bank & Anor* [1975] AC 581; [1975] 2 WLR 690.

In *Yat Tung*'s case itself, the bank sold some property to Yat Tung which mortgaged the same property back to the bank. Yat Tung defaulted on payment of interest on the mortgage and the bank exercising its right of

A sale, sold the same property to the second respondent. After such sale to the second respondent, in 1969, Yat Tung sued the bank on the ground that the bank's sale of the property to Yat Tung in the first place was a sham and therefore a nullity and the bank counterclaimed for loss on resale to the second respondent, denying the alleged nullity. Yat Tung failed in this first action and the bank succeeded. After the judgment, Yat B Tung sued in 1972 once more in a second action on the ground that the subsequent sale by the bank to the second respondent of the same property was fraudulent, etc on the ground of some collusion between the bank and the second respondent. It will be remembered that the sale to the second respondent took place before Yat Tung filed the earlier action. On appeal, C and even further appeal to the Judicial Committee, the order was confirmed on the ground that the doctrine of res judicata applied.

Thus, in *SCF Finance Co Ltd v Masri & Anor (No 3)* [1987] QB 1028; [1987] 1 All ER 194, the English Court of Appeal held that even a reservation of an issue by a party in a previous proceeding was ineffective D to prevent the estoppel from arising against the said party, where the said party had pleaded that issue but elected not to proceed on the issue in the previous proceeding. It was held she was not entitled to assert that issue afresh in subsequent proceedings, even if that issue was not heard and determined and it was even 'reserved'.

E In *Bell v Holmes* [1956] 3 All ER 449; [1956] 1 WLR 1359, that the issue of the plaintiff's own liability for contributory negligence, when suing the defendant, was the same issue of both their respective liabilities towards a third person arising from the same collision in an earlier action, and the learned judge held that, after comparing the pleadings of the action before him and the pleadings in the previous county court proceedings, that the F issues of fact and the evidence to support them were identically the same. The plaintiff was estopped from denying that he was 5% to blame as was adjudged in the previous county court action.

In *Hoystead v Taxation Commissioner* [1962] AC 155, in assessment for financial year 1918–1919, the trustees of a deceased person's estate G claimed, by virtue of a certain section of a certain statute, a deduction of £5,000 in respect of each daughter of the deceased as the annual income was divisible among the testator's daughters. The claim was disputed and a case was stated for the High Court — which then decided that such deductions could be made for all the six surviving daughters. Subsequently, upon the assessment for the financial year 1920–1921, the Commissioner H this time allowed only one deduction contending that the daughters were not 'joint owners' within the meaning of that certain statute. The Privy Council held that though in previous litigation, no express decision was given whether the daughters were such joint owners, it being assumed and admitted they were, the admission that they were joint owners having been fundamental to the previous decision, the Commissioner was estopped I from asserting before the Judicial Committee that the daughters were not joint owners.

A word of caution is required about the words 'exercising reasonable diligence' in the said famous passage [in *Henderson v Henderson* (1843) 3

Hare 100]. The words do not, in our view, necessitate a mental exercise of making a finding as to whether there was diligence, or reasonable diligence, in the earlier failure to bring in at the previous trial, the issues which should have been brought in the earlier action and which were not, or in asserting all other causes of action arising out of the same facts in the earlier action and which were not. A

The words ought to be understood as a gentle rebuke for the failure aforesaid, ie despite the fact that the party had the opportunity of bringing forward all such issues or asserting all such causes of action; and the words are not meant to impose a pre-condition for applying the doctrine of res judicata but are meant to say that the said non-bringing of the issues would count in any event irrespective of whether the said failure was or was not deliberate or due to inadvertence or negligence. Otherwise, the words would have virtually all but destroyed the efficacy of estoppel *per rem judicatum*. B C

Another source of small confusion is the rule that generally an estoppel, of which an estoppel *per rem judicatum* is a kind, as the name implies, has to be pleaded. But in *Superintendent of Pudu Prison v Sim Kie Chong* [1986] 1 MLJ 494 at p 498, Abdoolcader SCJ held to the effect that the court has the inherent jurisdiction to dismiss an action by applying the doctrine of res judicata against a party even if it has not been pleaded. We venture to think the reason for the ratio is that an estoppel or exclusion of evidence based on a question of public policy, ie in this case, the question of public policy that there should be finality in litigation, is more vigorous in excluding evidence and need not be pleaded, unlike an ordinary estoppel which should be pleaded. D E

We think we have dealt with certain parts of the doctrine of res judicata sufficiently for the purpose of determining the instant appeal. We now revert to the factors in the instant appeal. F

Looking at the wording of both the earlier originating motion aforesaid and the statement of claim in the action concerned herein, and looking also at the content of the supporting affidavit of the earlier originating motion, the causes of action of both proceedings are identical. Both claim damages for failure or refusal of the identical finance company to allow the same borrower to utilize in full the identical loan of RM750,000, causing loss consequent upon the failure of the identical housing scheme or housing development to be proceeded further. The action in the court below and immediately concerned herein claims only one relief or one relief in substance, damages for refusal to allow the borrower to borrow the full sum of RM750,000. G H

Again all rights and liabilities of both parties had merged into the judgment delivered on the said originating motion and the judgment was confirmed by the Supreme Court and it is therefore final. The cause of action estoppel applies unquestionably against the borrower and the borrower's case represents a classical case for the application of the doctrine of res judicata by way of a cause of action estoppel; the cause of action being the action for damages for refusal of the finance company to allow I

A the borrower to utilize or borrow completely the total sum of the agreed loan. The effect of a cause of action estoppel is so absolute that it is really unnecessary to delve further into the issues of law or of fact. What we just said however is subject to what is to be said further below.

Besides the question of res judicata raised by the finance company, B the finance company also pleads a point of limitation against the borrower. Having held that the cause of action estoppel applies, it will be unnecessary to decide on this, unless the borrower's further submission of the applicability to the instant appeal of the Supreme Court case of *Kandiah Peter*, succeeds; that case will presently be looked into.

The ratio decidendi of that case is that a chargee in an originating C summons in the High Court who makes an application for an order of sale in a foreclosure proceeding does not commence an action or suit, but merely enforces his rights by exercising a statutory remedy against the chargor in default. Such foreclosure proceedings do not result in a final judgment; so that the doctrine of res judicata cannot apply to subsequent D proceedings between the same parties as one of the essential requirements of the said doctrine is the existence of a final judgment in the previous proceeding and in a foreclosure proceeding, such a final judgment is missing.

The equivalent of the said foreclosure proceeding of a charge action E in High Court for the statutory remedy of an order of sale commenced by an originating summons should be the application to the land administrator of the relevant land office for a similar order of sale in respect of a land office title. The said originating motion in the High Court cannot be described as a foreclosure proceeding, neither is it one, for among other things, the order of sale had already been granted (some time before the F separate and distinct originating motion was filed) in an earlier foreclosure proceeding before the land administrator in question. The refusal by the High Court of the said relief, ie the claim for damages for not being allowed to draw completely the said loan in the said originating motion, was upheld by the Supreme Court. It will be otiose to attempt to treat the said originating motion as a foreclosure proceeding. The borrower cannot G rely on the case of *Kandiah Peter*. The plea of res judicata therefore still succeeds.

We therefore allow the appeal, setting aside the order of the court below and we further make an order in terms of the application dated 23 August 1993 to strike out the statement of claim to dismiss the action. We H further order costs against the respondent here and below. Deposit is to be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim

I